Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1995

Republican Party of Alaska,

Petitioner,

v.

Mike O'Callaghan, Jed Whittaker, Robert Gigler, Alaskan Voters for an Open Primary, and State of Alaska, Lieutenant Governor Jack Coghill, in his official capacity as Lieutenant Governor,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Alaska

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Alaska Election Code provides for a single "blanket" primary election in which any voter has the right to vote for any candidate, regardless of the party affiliation of the voter or the candidate. The Rules of the Republican Party of Alaska (RPA) provide that only registered Republicans, registered independents, and registered voters who state no preference of party affiliation may vote in the Alaska Republican primary election. The Supreme Court of Alaska held (3 to 1) that the Alaska blanket primary statute does not violate the right of the Republican Party of Alaska and its members to free political association guaranteed by the First and Fourteenth Amendments to the United States Constitution.

The questions presented are:

(1) Whether this decision conflicts with prior free political association decisions of this Court such as *Burdick v. Takushi*, 504 U.S. 428 (1992); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986); and *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981).

(2) Whether it is a violation of the First Amendment right of free political association for the State of Alaska to require the Republican Party to participate in a blanket primary election, in which registered Democrats and members of other political parties may vote on Republican nominees, as a condition of placing Republican candidates on the Alaska general election ballot.

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PETITION FOR WRIT OF CERTIORARI

The Republican Party of Alaska and its members respectfully petition for a writ of certiorari to review a decision of the Supreme Court of Alaska, and request that this matter be considered on an expedited basis.

OPINIONS BELOW

The final opinion of the Supreme Court of Alaska is reported at 914 P.2d 1250 (Alaska 1996). App. 1-43.

JURISDICTION

The Supreme Court of Alaska published its original opinion on March 20, 1996. The original opinion was withdrawn and reissued on April 12, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RPA RULES INVOLVED

The United States Constitution, First Amendment:

> *Freedom of religion, of speech, and of the press.* Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

A.S. 15.25.010:

> *Provision for Primary Election*: Candidates for the elective state executive and state and national legislative offices shall be nominated in a primary election by direct vote of the people in the manner prescribed by this chapter.

A.S. 15.25.030 is reprinted at App. 47-49. Article XII, Section 14 and Article XIV, Sections 1 through 5, of the RPA Rules are reprinted at App. 51-53.

STATEMENT OF THE CASE

PRESENTATION OF FEDERAL QUESTION

The constitutional right of the RPA and its members to free political association was presented to the trial court by the State of Alaska on August 26, 1993, in the Memorandum in Support of State's Motion for Summary Judgment. The RPA identified its First Amendment right to free political association in the first documents it filed in the Supreme Court of Alaska: Memorandum in Support of Motion to Intervene as Party Defendant and Answer to Complaint of Mike O'Callaghan, both filed February 17, 1995.

STATEMENT OF FACTS AND PROCEEDINGS

A.S. 15.25.010 provides for a single blanket primary election in the State of Alaska, in which any voter has the right to vote for any candidate for each public office

listed on the ballot, regardless of the party affiliation of the voter or the candidate. In the blanket primary, the candidates of each political party are selected to appear on the general election ballot for the offices of governor, lieutenant governor, members of the Alaska State Senate and State House of Representatives, and Alaska representatives to the United States Senate and House of Representatives. The Alaska blanket primary statute conflicts with Article XIV, Section 1, of the RPA Rules, which provides that only registered Republicans, registered independents, and those who state no preference of party affiliation shall be allowed to vote in the Republican primary election for governor, lieutenant governor, United States Senator, United States Representative, and members of the Alaska Legislature.[1]

The RPA adopted Article XIV, Section 1, of its rules on March 31, 1990. The RPA requested the State of Alaska to implement its rule for the 1990 primary election. The State of Alaska refused to do so. The RPA then filed an action in the United States District Court for the District of Alaska to require that its party rule be implemented for the 1990 Republican primary election. *Doyle v. State*,

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[1] The RPA rule excludes those persons whose voter registrations show that they are affiliated with another political party. There are 395,493 registered Alaska voters, consisting of Republicans (95,599), Democrats (66,708), Alaskan Independence Party (15,251), Green Party (2,909), other parties (4,726), declared non-partisan (87,411) and undeclared (122,889). *Alaska Division of Elections, List of Registered Voters by Party within District*, May 1, 1996. Under the RPA rule, approximately 77% (305,899) of registered Alaska voters may vote in the Republican primary election.

F90-33 CV (D. Alaska 1990). The District Court declined to do so, however, because United States Justice Department preclearance of the RPA rule had not been obtained in sufficient time to implement the rule in 1990.

After Justice Department preclearance had been obtained, the RPA requested the State to implement its rule for the 1992 Republican primary election. The State again refused to do so. The RPA filed a second action in the District Court, *Zawacki v. State*, A92-414 CV (D. Alaska 1992). In *Zawacki*, the Honorable James K. Singleton announced a tentative decision that, under *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), the Alaska blanket primary statute infringed on the RPA's right to free political association (App. 3-4), and that the Lieutenant Governor had the authority pursuant to *Tashjian* to implement regulations contrary to statute to protect the RPA's right to free political association. Based on Judge Singleton's tentative decision, the parties in *Zawacki* were able to stipulate that the 1992 Republican primary election would be conducted in accord with the RPA rule. The State adopted temporary regulations for the 1992 primary election, and permanent regulations for the 1994 primary election. 6 AAC 28.100 - .150. The 1992 and 1994 primary elections were conducted pursuant to the RPA rule and these regulations.[2]

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[2] The State has continued to refuse to implement Article XIV, Sections 2, 3, and 5 of the RPA rules. App. 51-53. The RPA is presently seeking the implementation of Sections 3 and 5 in *Ross v. State of Alaska*, United States District Court for the District of Alaska, Case No. A95-0053 CV (HRH). Section 5, which places a six month prior party registration requirement on candidates, is now particularly important. As the Supreme Court of Alaska

Mike O'Callaghan, a *pro se* litigant, filed the case at bench in the Alaska Superior Court challenging the legality of the 1992 and 1994 primary elections. The RPA was not a participant before the trial court. The trial court granted summary judgment in favor of the State, and Mr. O'Callaghan appealed to the Supreme Court of Alaska. After briefing and oral argument on appeal, the Supreme Court of Alaska invited certain organizations, including the RPA, to participate as parties or amicus curiae. *O'Callaghan v. Coghill*, 888 P.2d 1302, 1305-1306 (Alaska 1995). These additional participants were allowed to file supplementary briefs limited to addressing the constitutionality of Alaska's blanket primary statute, and were prohibited from addressing any other issues in the case.[3]

On February 17, 1995, the RPA filed a motion to intervene in the Supreme Court of Alaska, accompanied by a complaint in intervention. The Supreme Court of Alaska allowed the RPA to intervene on February 27, 1995.[4] Originally, the State of Alaska supported the position of the RPA. However, on March 6, 1995, in a memorandum filed with the Supreme Court of Alaska, the

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has prevented the RPA from determining voter qualifications for participation in the Republican primary, it becomes much more important that the RPA should be able to determine candidate qualifications.

[3] Since the RPA did not participate at the trial court level, it was not able to make a factual record. The RPA's presentation of its case was limited to briefing only a single issue before the Supreme Court of Alaska.

[4] The Alaskan Voters for an Open Primary also participated as an intervenor. The Alaskan Independence Party and the Alaska Federation of Natives participated as amici curiae.

State changed its position to support the plaintiffs and defended the constitutionality of the Alaska blanket primary statutes.[5]

Once the State of Alaska changed its position, the RPA was the only party defending the RPA rule and State regulations. On March 9, 1995, the RPA timely removed this case to the United States District Court as *O'Callaghan v. Coghill*, Case No. A95-0087 CV (HRH). The State of Alaska, the Alaskan Voters For An Open Primary, and Mike O'Callaghan filed motions to remand. The District Court remanded this case to the Supreme Court of Alaska on June 29, 1995.[6]

The first opinion of the Supreme Court of Alaska was issued on March 20, 1996. This opinion was withdrawn, and a revised opinion was issued on April 12, 1996. App. 1-43.[7] By a three to one decision, the Supreme Court of

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[5] In effect, by changing its position, the State of Alaska unilaterally repudiated its agreement with the RPA pursuant to which the 1992 federal litigation was resolved, and the Republican primary election implemented. The governor of Alaska in 1992 was a member of the Alaskan Independence Party. The governor at the time of the 1995 repudiation was a Democrat. The First Amendment right of the RPA to free political association fell victim to the politics of the moment.

[6] The RPA believed that the remand order was incorrect as a matter of law, but had no remedy. The remand order was not reviewable on appeal or otherwise. 28 U.S.C. § 1447(d).

[7] The difference between these opinions is that the first opinion directed a remand for the entry of a declaratory judgment by the Superior Court, while the current opinion contains the entry of a declaratory judgment by the Supreme Court of Alaska itself.

Alaska held that Alaska's blanket primary statute is constitutional, and that any interference between Alaska's blanket primary statute and the RPA's rights of free political association is minor and justified by the State's interests. In reaching this decision, the majority opinion placed the burden of proof on the RPA to show a substantial burden to its associational rights. *Heavey v. Chapman*, 611 P.2d 1256 (Wash. 1980). However, notwithstanding the fact that the majority placed the burden of proof on the RPA, the majority did not afford the RPA any opportunity to make a factual record before the trial court.[8]

Justice Jay A. Rabinowitz, in a correct and well-reasoned dissent (App. 33-43), would have placed the burden on the State of Alaska to demonstrate compelling reasons for limiting the associational rights of the RPA. As the State had failed to demonstrate any such compelling reasons, Justice Rabinowitz concluded that the Alaska blanket primary statute is unconstitutional under the First and Fourteenth Amendments to the United States Constitution. App. 42-43.

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[8] The RPA pointed out to the Alaska Supreme Court that it was necessary for a remand to develop factual issues if the Court was going to abrogate the RPA's right to free political association. App. 25, n.16.

REASONS FOR GRANTING THE WRIT

I. THE SUPREME COURT OF ALASKA HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND A PRIOR DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA, AND IS INCORRECT AS A MATTER OF FEDERAL CONSTITUTIONAL LAW.

Freedom of association is among the preferred rights derived from the First Amendment guarantees of speech, press, petition and assembly. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Buckley v. Valeo*, 424 U.S. 1 (1976). It is beyond debate that freedom of association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the due process clause of the Fourteenth Amendment. *NAACP v. Alabama, ex rel. Patterson*, 357 U.S. 449, 460 (1958).

The Alaska blanket primary statute interferes with the right of the RPA to free political association by preventing the RPA from using its chosen method of selecting candidates to represent the RPA on the general election ballot. Specifically, the Alaska statute requires the RPA to participate in a primary election system in which Democrats and members of other political parties may vote to choose Republican candidates. This procedure violates the rules of the RPA. The RPA is compelled by law to participate in this system, and may not choose its nominees in any other way. App. 37-38.

This Court has made it absolutely clear that the Supreme Court of Alaska must apply strict scrutiny in

determining the constitutionality of Alaska's blanket primary statute. *Burdick v. Takushi*, 504 U.S. 428 (1992), *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), and *Democratic Party of the United States v. Wisconsin, ex rel. LaFollette*, 450 U.S. 107 (1981). If a challenged law burdens the right of free political association of a political party and its members, the law can survive constitutional scrutiny only if the State shows that the law advances a compelling State interest and is narrowly tailored to serve that interest. *Burdick v. Takushi*, 504 U.S. 428 (1992), *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989).

This Court has repeatedly held that one of the basic rights of free political association is the right to nominate candidates of the party's choice. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986) involved the selection of Republican candidates to run in the general election. The State of Connecticut wanted to keep the candidate selection process closed, while the party wanted to allow certain non-party members to vote. *Democratic Party of the United States v. Wisconsin, ex rel. LaFollette*, 450 U.S. 107 (1981) involved the delegate selection process of a national party for national conventions. The State of Wisconsin wanted to keep the delegate selection process open, while the party wanted to close the process to outsiders. In both *Tashjian* and *LaFollette*, this Court held that the parties' desires prevailed over the states' interest in opening or closing the candidate or delegate selection process. In *LaFollette*, this Court specifically stated:

> It is for the National Party – and not for the Wisconsin Legislature or any court – to determine the appropriate standards for participation in the party's candidate selection process.

LaFollette, 450 U.S. at 124, n.27.

The decision of the majority of the Alaska Supreme Court conflicts with the previously cited decisions of this Court.[9] The majority relied on *Heavey v. Chapman*, 611 P.2d 1256 (Wash. 1980). *Heavey*, a pre-*Tashjian* case, placed the burden on the plaintiffs to show a substantial burden to their associational rights. *Tashjian*, however, places the burden on the State to show a compelling State interest and narrowly-tailored law. Contrary to *Tashjian*, the Alaska majority placed the burden on the RPA to show a substantial burden to its associational rights. The majority decided against the RPA because it did not make such a showing. However, the Court gave the RPA no opportunity to make a record before the trial court.

Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) very clearly conflicts with the majority decision in other ways. In distinguishing *Tashjian* from prior cases in which this Court has considered claims by non-members of a party seeking to vote in that party's primary despite the party's opposition, the *Tashjian* majority stated that in the class of cases where there is an element of potential interference with the rights of party members, the non-members desire to participate in the party's affairs is overborne by the countervailing and legitimate right of

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[9] The dissenting opinion of Justice Rabinowitz is correct as a matter of federal constitutional law.

the party to determine its own membership qualifications. *Tashjian*, 479 U.S. at 215, n.6 *citing Rosario v. Rockefeller*, 410 U.S. 752 (1973); *Nader v. Schaffer*, 417 F. Supp. 837 (D. Conn.), *summarily aff'd*, 429 U.S. 989 (1976). This principle applies equally to *Tashjian* and the case at bench. In both *Tashjian* and the case at bench, the qualified voters can generally be classified as Republican Party members and independent voters. Under both the Connecticut and Alaska rules, only registered members of other political parties are excluded from participating in the respective primary elections.

Concerns raised in the dissenting opinions in *Tashjian* are not applicable to the case at bench. The dissenting opinion of Justice Stevens, joined by Justice Scalia, deals with the voter qualifications clauses of the United States Constitution. This concern is not present in the case at bench. Alaska has a statewide voter registration system, and every person who is qualified to vote in a federal election for a member of the House of Representatives or for a United States Senator is also qualified to vote for candidates to the Alaska House of Representatives.

The dissenting opinion of Justice Scalia, joined by Chief Justice Rehnquist and Justice O'Connor, questioned the extension of the concept of free political association to the casual contact of an independent voter casting a vote in the Republican Party primary election. The right of free political association is very clearly applicable, however, where the State requires the RPA to accept registered political opponents as voters in its primary election. Justice Scalia also questioned the propriety of a process that permits the members votes to be diluted by the votes of outsiders. By excluding the votes of Democrats and

members of other political parties, the RPA corrected a more serious dilution of its members' votes that had existed in the past.

The alleged State interests cited by the Alaska majority do not justify the State's infringement on the RPA's associational rights. First, the majority cites three justifications from *Heavey v. Chapman*, 611 P.2d 1112 (Wash. 1980). These are (1) secrecy, by allowing each voter to keep party identification, if any, secret; (2) greater voter participation by allowing the broadest possible participation in the primary election; and (3) maximizing voter choice by giving each voter a free choice among all candidates in the primary. App. 14-15.

Secrecy is not a valid justification. In Alaska, each registered voter's party identification, if any, is a matter of public record available for public inspection. Greater voter participation is not necessarily encouraged by a blanket open primary election. In fact, voter participation would logically increase in "closed" party primary elections because the primary elections would be a more meaningful method of choosing candidates. Finally, maximizing voter choice is an interest which is applicable to the general election. Voters in a primary election should not be allowed to freely choose among candidates of an opposing party, because the purpose of the primary election is for each party to select its candidates in its chosen manner.

The Alaska majority opinion also holds that the State has a legitimate interest in forcing the major political parties to have a broad cross-section of support from the voters, by forcing the parties to accept voters of opposing

political parties in their primary elections. App. 27. The majority observes that in Alaska, where a majority of the voters are not affiliated with any party, a closed or partially closed primary system can be viewed as bestowing a disproportionately powerful role in the selection of public office holders on a minority of the electorate, and that this is power taken from unaffiliated voters. App. 29. This is nonsense as a matter of Constitutional law, and is not even involved in the case at bench. The right of individuals who organize should not be abrogated in order to strengthen the political power of the unaffiliated. Political power of those individuals who care enough to actively participate in the political process should not be destroyed. This alleged dilution of the power of the unaffiliated would not occur under the RPA rules. The RPA rules allow unaffiliated voters to participate in the Republican primary election. The only political power lost when the RPA rule was implemented was the power of Democrats and members of other political parties to interfere in the Republican primary election.

The decision of the Supreme Court of Alaska also conflicts with the 1992 tentative decision in *Zawacki v. State*, A92-414 CV (D. Alaska 1992). In his tentative decision, Judge Singleton correctly relied on *Tashjian*, stating that the Alaska blanket primary statute infringed the RPA's associational rights (App. 3-4) and that the Lieutenant Governor had the authority to promulgate regulations implementing the principles enunciated in *Tashjian*. Judge Singleton's tentative decision was the basis for the stipulation to conduct the 1992 Republican primary in accord with the RPA Rule.

The right to free political association of the RPA has been violated in a manner contrary to prior decisions of this Court and the United States District Court for the District of Alaska. The decision of the majority of the Supreme Court of Alaska is wrong on an important matter of federal constitutional law. This petition for certiorari should be granted in order to correct the decision of the Supreme Court of Alaska on a crucial federal constitutional right to conform to prior decisions of this Court.

II. REQUIRING THE RPA TO ALLOW DEMOCRATS AND MEMBERS OF OTHER POLITICAL PARTIES TO SELECT REPUBLICAN CANDIDATES SEVERELY HARMS THE RIGHT TO FREE POLITICAL ASSOCIATION OF THE RPA AND ITS MEMBERS.

Individuals organize into political parties for the purpose of nominating and electing candidates to represent the individuals' principles and goals. The basic purpose of a political party is to elect candidates to public office. Selection of candidates is the very essence of political expression. Candidate selection translates the appeal to common principles and objectives into concerted action to advance these principles and attain these goals. Nothing is more basic to this right than that the parties themselves determine the manner by which their candidates shall be selected and who may participate.

The first major purpose of the RPA in changing its primary election process was to prevent the Democrats from selecting the weakest Republican candidate in the Republican primary election, so that the Democrats could

defeat the weak Republican candidate in the general election. A system which allows party members to select the worst candidates of the opposing party to be candidates in the general election does not lead to good candidates being selected, nor to good government.

A classic example of the cross-over problem was the Alaska primary election in 1984 for House District 14, Seat A. The only Democratic candidate was James Duncan. Ramona Barnes and Marco Pignalberi were the two Republican candidates. Ramona Barnes, the incumbent, was a senior legislator, and the leader of the Republicans in the Alaska House of Representatives. As such, she was a top Democratic target. In the blanket primary, James Duncan received only 329 votes. Marco Pignalberi defeated Ramona Barnes by a vote of 2816 to 1819. The extremely low number of voters in the Democratic primary election shows a massive Democratic cross-over which defeated the House Republican leader.

In the 1990 primary election for Senate District F-B, no candidate ran as a Democrat. The Republican candidates were Jan Faiks, former Republican Senate President, and Virginia Collins, a Republican member of the House of Representatives. Jan Faiks, a Republican leader, was a Democratic target. Since the Democrats did not field a candidate, almost all Democrats crossed-over into the Republican primary election, resulting in Jan Faiks' defeat by a 53% to 47% voting margin.

Cross-over voters also affected the election for governor of Alaska in 1978. Democratic voters crossing into the Republican primary election allowed Jay Hammond, a Republican legislator, to defeat Walter J. Hickel, former

Secretary of the United States Department of the Interior and former Governor of Alaska. In the 1978 gubernatorial primary election, 24,675 individuals voted for Democrats and 81,632 persons voted for Republicans. Again, the low number of voters in the Democratic primary shows a massive cross-over of Democrats into the Republican primary election.

Democrats also crossed into the Republican primary election for United States senator in 1974. Mike Gravel was the only Democratic candidate. The two Republican candidates were C.R. Lewis, a leader of the John Birch Society, and Terry Miller, a moderate. Democratic cross-over voters gave C.R. Lewis the victory in the Republican primary election. As an extreme conservative, Mr. Lewis was unacceptable to most of the electorate. Mike Gravel, the Democrat, then won the general election.

Mike Gravel, the incumbent, and Clark Gruening were the two Democratic candidates in the 1980 United States Senate race. A Republican cross-over vote resulted in Clark Gruening defeating Mike Gravel. The Republican candidate, Frank Murkowski, then won the general election, and presently serves in the United States Senate. In this election, 72,368 persons voted Democratic, while only 27,632 persons voted Republican. There were six Republican candidates in that primary election. Nevertheless, Republicans crossed over into the Democratic primary election in order to defeat the incumbent senator, Mike Gravel.

A comparison of the vote in the 1980 senatorial primary with the vote in the 1978 gubernatorial primary, illustrates the magnitude of cross-over voting:

Primary Election	Republican	Democrat
1978 Gubernatorial	81,632	24,675
1980 U.S. Senate	27,632	72,368

The RPA had solved the cross-over voting problem by adopting rules to exclude declared political opponents from the Republican primary. However, the RPA can no longer do so, and Alaska has returned to the system whereby party members may select the weakest candidate of the opposing party to represent the opposing party in the general election.

A second major purpose of the RPA primary election rules is to prevent elected Republican legislators from abandoning their Republican colleagues by joining leadership coalitions dominated by Democrats. In the 1990 election, the last year of the blanket primary, enough Republicans were elected to form a Republican majority in the Alaska Senate. However, certain Republicans desired benefits for themselves, which they might not have received from the Republican majority. Accordingly, three Republican legislators abandoned their Republican colleagues and entered into a coalition dominated by Democrats in order to obtain leadership roles for themselves.

As the new RPA rule was in place for the 1992 Republican primary, none of the three 1990 defectors were re-nominated as Republicans. Democrats could not reward the Republican defectors with votes in the Republican primary. Republican voters elected other candidates, and there has not been a defection since. In fact, largely because of the discipline imposed by the primary rule, Republican legislators have been in the majority in both

the Alaska House and Senate since the rule was implemented.

The right of the RPA to exclude Democrats and members of other political parties from its primary election is also crucial for another reason. Many elections in Alaska are decided by very close margins. For example, present governor Tony Knowles was elected by a plurality vote of approximately one vote per precinct in the 1994 Alaska gubernatorial election. In a state where close elections are the norm, allowing the 23% of voters who are declared political opponents of the RPA into the Republican primary election allows these opponents an unusual power to adversely affect the Republican outcome.

The Republican Party firmly believes that Republican legislators do a better job when they are evaluated in the next primary election by Republican and independent voters. There is much less incentive for a Republican legislator to adhere to the precepts of the Republican Party when the legislator is being evaluated by a group which includes a substantial number of Democrats and other political party members.

The Republican Party did not make these changes in its primary election process lightly or arbitrarily. The Republican Party believes that these changes will lead to politicians acting in a more responsible manner and acting in a manner more responsive to their constituents. Hopefully, this will lead to better government. This principle is crucial to Republican politics, and the continuation of a partially closed Republican primary is necessary to accomplish this goal. Republican primary elections, or

Democrat or other party primary elections for that matter, should not be decided by voters of an opposing party.

The blanket primary statute of Alaska forces the RPA to affiliate politically with registered voters of other political parties for the purpose of selecting candidates to represent the Republican Party in the general election. If the right to free political association means *anything*, it means *at least* that the RPA has the right to exclude "the enemy" from its candidate selection process. The nature of the constitutional right involved, the infringement on it, and the severe harm to the RPA require that this Court grant this petition for certiorari and protect the right of the RPA and its members to free political association.

III. THIS CASE IS CRUCIALLY IMPORTANT TO OTHER STATES.

The primary election laws of at least two other states, Virginia and California, will be the subject of future judicial proceedings seeking to void those state laws on the ground that the political parties' rights to free political association have been infringed. Any decision by this Court in the case at bench will greatly impact future primary election/free political association litigation.

Primary election/free political association litigation already exists in Virginia. *Marshall v. Meadows*, 3:96CV208 (E.D. Va. 1996), was filed on March 8, 1996. The plaintiffs in *Marshall* were Robert G. Marshall and Patrick M. McSweeney. Mr. Marshall is a member of the Republican Party of Virginia and the incumbent delegate representing House of Delegates Election District 13 in the Virginia

General Assembly. Mr. McSweeney is a member and was then the chairman of the Republican Party of Virginia.

The plaintiffs sought an order, enjoining the defendant members of the Virginia State Board of Elections from enforcing Section 24.2-530 of the Code of Virginia. Plaintiffs urged that the Virginia law is unconstitutional on its face and in its application to them because it unlawfully infringes on their rights to associate freely with other citizens for the advancement of shared political objectives, as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. The complaint alleged that the law of Virginia required the Republican Party of Virginia to open its primary nomination process to individuals who do not meet the party's qualification for participation in the selection of the party's candidates.

On April 17, 1996, the District Court dismissed the Virginia litigation holding that the plaintiffs lacked standing, failed to show a redressable injury, and were barred by laches. The action had been brought by individuals rather than by the Republican Party of Virginia. The primary election had actually been authorized by the Party. Laches was applicable, because the plaintiffs knew for approximately one year that the incumbent senator intended to seek renomination by primary election. The litigation was filed only 95 days before the date that the Republican primary was to be held. In its dismissal, the District Court did not address the merits of the case. Despite the dismissal, the Virginia litigation is not yet over. The Virginia plaintiffs intend to continue litigation to obtain a decision on the merits, but in a manner that

takes the case beyond the Virginia Senatorial primary of June 11, 1996.[10]

The voters of California adopted Initiative Proposition 198 on March 26, 1996. This proposition provides for a blanket open primary election in California. The bylaws of the Republican Party of California permit only registered Republicans to vote in its primary election. The Democratic Party of California is expected to act within the month to close its primary election.[11] California's major political parties will mount a legal challenge to this proposition. However, since the first California election to be affected by this proposition will not take place until 1998, litigation will not be filed immediately. At the present time, California political attorneys are closely monitoring the Alaskan case at bench. *The Seiler Report*, March 31, 1996, at 4 (a newsletter of California elections).

The future California case is identical to the case at bench in that it also presents the issue of whether the First Amendment protects the right of a political party to prevent its political opponents from participating in the selection of the party's candidates for public office. The California case will involve an enacted initiative provision. However, a voting majority has no greater right to abrogate First Amendment rights than a state has to legislate them away.

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[10] Letter from Daniel A. Carrell, attorney for plaintiffs, to Kenneth P. Jacobus, dated May 7, 1996.

[11] Telephone conversation: Kenneth P. Jacobus to George Waters, an attorney for the Democratic Party of California, May 22, 1996.

This petition for certiorari should be granted for the additional reason that the decision of the Supreme Court of Alaska will be cited as bad precedent in future Virginia and California litigation. This decision must be corrected as soon as possible, so that future litigation in other jurisdictions is not contaminated by law which incorrectly limits the First Amendment right to free political association.[12]

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[12] A denial of a petition for a writ of certiorari ordinarily carries with it no implication regarding this Court's view on the merits of the case. The sole significance of such a denial is that fewer than four members of the Court deem it desirable as a matter of sound judicial discretion to review a decision of a lower court. *State of Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950). However, a denial of the petition in the case at bench will be interpreted as a decision on the merits.

This is a classic case in which certiorari should be granted. It is brought by a major political party. It involves a severe infringement of a First Amendment Constitutional right, in a manner which conflicts with prior decisions of this Court. The infringement harms many thousands of Alaskan Republicans, as well as those independent voters who support Republican principles and candidates. The case at bench will substantially affect, if not control, future litigation in Virginia and California. Finally, this case involves none of the other factors, such as technical requirements or a cloudy record, which are referenced by Justice Frankfurter in *Baltimore Radio Show* to suggest other reasons for the denial of a petition for certiorari. 338 U.S. at 917-918.

IV. THE RPA HAS DETERMINED TO PRIVATELY SELECT ITS CANDIDATES IN 1996, WHICH NECESSARILY INVOLVES FURTHER FEDERAL LITIGATION AND WILL CAST SEVERE DOUBT AND CONFUSION UPON THE ALASKA 1996 STATUTORY PRIMARY.

At its most recent state convention, on April 25, and 26, 1996, the RPA reaffirmed its commitment to the RPA Primary Election Rules. It is totally unacceptable to the RPA to have Democrats and members of other political parties participating in its candidate selection process. On May 20, 1996, the executive committee of the RPA determined to proceed with a privately conducted primary election, in accordance with RPA rules, using mail-in ballots. This procedure is not authorized by Alaska Statute. The mail-in Republican primary election will take place only if this Court does not reverse or stay the decision of the Supreme Court of Alaska, such that the 1996 Republican primary election can be conducted according to RPA Rules.

The RPA has filed an application with the United States Department of Justice for preclearance of the mail-in Republican primary election. Additionally, the RPA intends to immediately file an action in the United States District Court for the District of Alaska requesting that the State be required to accept the candidates selected in this privately conducted primary election as the candidates of the RPA to be included on the 1996 general election ballot. This procedure will necessarily cast considerable doubt and confusion into the 1996 Alaska elections. However, the Republican Party has no choice. It

must now institute a privately conducted primary election in order to protect its right to free political association. The RPA prefers that its primary election be conducted in the same way it was conducted in 1992 and 1994, but must protect its right to free political association in the event that this is not possible.

The petition for certiorari should be granted by this Court in order to avoid the necessity of further proceedings before the United States Department of Justice and the United States District Court, and the confusion and doubt that these proceedings will raise in the 1996 Alaska elections.

V. PROTECTING THE FIRST AMENDMENT RIGHT OF THE RPA AND ITS MEMBERS TO FREE POLITICAL ASSOCIATION IS EASILY ACCOMPLISHED.

The majority opinion of the Supreme Court of Alaska is clearly wrong. If the right to free political association under the First Amendment to the United States Constitution means *anything*, it means *at least* that the RPA has the right to exclude members of other political parties from participating in the RPA's candidate selection process. The opinion of the Supreme Court of Alaska contains a correct and well-reasoned dissent by Justice Jay A. Rabinowitz. Finally, the law relating to the right to determine who may participate in a party's candidate selection process has been determined in various prior decisions of this Court.

This Court can easily correct the infringement of the RPA's associational rights imposed by the Alaska blanket

primary statute and the majority opinion of the Supreme Court of Alaska. This Court should grant this petition for writ of certiorari, summarily reverse the decision of the Supreme Court of Alaska, and adopt the dissenting opinion of Justice Rabinowitz as the opinion of this Court. The law in this area is so clear, and the damage done to the associational rights of the RPA and its members so obvious and palpable, that further briefing is not necessary.

CONCLUSION

The petition for writ of certiorari should be granted, the majority opinion of the Supreme Court of Alaska summarily reversed, and the dissenting opinion of Justice Jay A. Rabinowitz adopted as the opinion of this Court.

This should be done on an expedited basis, because the Alaskan primary election candidate filing deadline is June 1, 1996, the Alaskan primary elections will take place on August 27, 1996, and the right to free political association of the RPA and its members needs to be protected for the 1996 primary and general elections.

Respectfully submitted,

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Notice: This opinion is subject to correction before publication in the Pacific Reporter. Readers are requested to bring errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, phone (907) 264-0607, fax (907) 276-5808.

THE SUPREME COURT OF THE STATE OF ALASKA

MIKE O'CALLAGHAN, Appellant, and JED WHITTAKER, ROBERT GIGLER, and ALASKAN VOTERS FOR AN OPEN PRIMARY, Appellants/ Intervenors, v. STATE OF ALASKA; LIEUTENANT GOVERNOR JACK COGHILL, in his official capacity as Lieutenant Governor, Appellee, and REPUBLICAN PARTY OF ALASKA, Appellee/ Intervenor.	Supreme Court No. S-6249 Superior Court Nos. 3AN-92-08552 CI and 3AN-92-11150 CI (Consolidated) OPINION [No. 4338 – April 12, 1996]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Brian C. Shortell, Judge.

Appearances: Michael O'Callaghan, pro se, Anchorage. Max F. Gruenberg, Jr., Gruenberg & Clover, Anchorage, for Alaskan Voters for an Open Primary. Virginia B. Ragle, James L. Baldwin, Assistant Attorneys General, Bruce M. Botelho, Attorney General, Juneau, for State of Alaska. Kenneth P. Jacobus, Anchorage, for Republican Party of Alaska. Stephan H. Williams, Anchorage, for Amicus Curiae Alaska Federation of Natives. Edgar Paul Boyko, Edgar Paul Boyko & Associates, Anchorage, for Amicus Curiae Alaskan Independence Party.

Before: Rabinowitz, Matthews, Compton and Eastaugh, Justices. [Moore, Chief Justice, not participating.]

MATTHEWS, Justice.
RABINOWITZ, Justice, dissenting.

I. INTRODUCTION

The Alaska Election Code provides for a single "blanket" primary election in which a voter has the right to vote for any candidate, regardless of the party affiliation of the voter or the candidate. AS 15.25.010, et seq. In 1990 the Republican Party of Alaska (RPA) enacted a party rule which provides that only registered Republicans, registered Independents, and registered voters who state no preference of party affiliation may vote "in the Republican primary election. . . . "[1] The question in this case is

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[1] Republican Party Rule XIV § 1.

whether, in light of this rule, the blanket primary violates RPA's freedom of association rights and is thus unconstitutional. We answer this in the negative.

II. FACTUAL AND PROCEDURAL BACKGROUND

We have previously published an Order and Memorandum Opinion in this case, *O'Callaghan v. Coghill*, 888 P.2d 1302 (Alaska 1995), in which the underlying facts and proceedings are stated. We summarize them briefly here.

After adopting the party rule noted above, RPA sued the State in federal court, challenging the constitutionality of the statutory blanket primary system. *Zawacki v. State*, A92-414 CV (D. Alaska 1992).

United States District Court Judge James Singleton orally announced his tentative decision[2] that under Tashjian v. Republican Party of Connecticut, 479 U.S. 208

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[2] Judge Singleton explained his practice of announcing tentative decisions as follows:

> The important thing about a tentative decision is to alert you to the conclusions that I have reached legally and factually after reviewing your materials and the factual materials you have submitted in support of the memorandum. . . . So, again by announcing tentative decisions I am not suggesting that my mind is fixed in stone or that I am absolutely invulnerable to persuasion but only to suggest to you any factual or legal errors I may be laboring under so that in the course of your argument you can correct them.

(1986), the blanket primary infringed on RPA's associational rights.[3] Following Judge Singleton's tentative decision the parties stipulated that the lieutenant governor would adopt regulations which would provide for two separate ballots for primary elections.[4] A party rule ballot would contain the names of candidates who filed for the RPA nomination and would be available to Republican, nonpartisan, and undeclared voters. A statutory ballot would contain the names of candidates of all other political parties and would be available to all voters. A voter could vote only one ballot. The 1992 and 1994 primary elections were held under such regulations. *See* 6 AAC 28.100-150.

Mike O'Callaghan, acting without an attorney, filed suit in state superior court challenging the legality of the 1992 primary on the ground that the stipulated regulations were inconsistent with the election statutes. The superior court granted summary judgment in favor of the State.[5] On appeal we ruled that "a stipulation or consent

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[3] The court found that "federal law under the U. S. Constitution substantially restricts the state's power to . . . burden the exercise of the party's administrative rights . . . [including] the right to structure the manner in which their political candidates will be selected and to determine who participates in that selection procedure." However, Judge Singleton declined to issue a preliminary injunction, indicating that while the State could be compelled to eliminate all RPA candidates from the blanket primary, it could not be compelled to implement and pay for a primary designed by RPA.

[4] The United States District Court entered an order approving the stipulation.

[5] The State argued that "the challenged regulations are valid because they 'were properly adopted in accordance with a

judgment declaring a law unconstitutional is not valid" except in cases of clear unconstitutionality. *O'Callaghan*, 888 P.2d at 1303. We concluded that the standard of clear unconstitutionality had not been met. Further, we found that the briefing was inadequate to determine the constitutionality of the blanket primary and ordered additional briefing. In view of the importance of this case we invited participation by the political parties of Alaska and others. *Id.* at 1305.

O'Callaghan and the State of Alaska submitted supplemental briefs. The State changed its position and now defends the constitutionality of the blanket primary. The court granted RPA's motion to intervene. Alaskan Voters for an Open Primary (AVOP) were also allowed to intervene. The Alaska Federation of Natives filed an *amicus curiae* brief, and the Alaskan Independence Party filed a submission in lieu of an *amicus curiae* brief. At this point only RPA argues that the blanket primary is unconstitutional, while the other parties defend the blanket primary's constitutionality.

III. STANDARD OF REVIEW

In *Burdick v. Takushi*, 504 U.S. 428 (1992), the Supreme Court outlined the approach courts must take in cases in

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stipulation sanctioned by the United States District Court.' " *O'Callaghan*, 888 P.2d at 1303.

which election laws are challenged as violative of associational and voter rights. The Court noted:

> It is beyond cavil that "voting is of the most fundamental significance under our constitutional structure." . . . It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute. . . . The Constitution provides that States may prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," Art. I, § 4, cl.1, and the Court therefore has recognized that States retain the power to regulate their own elections. . . . Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." . . .
>
> Election laws will invariably impose some burden upon individual voters. Each provision of a code, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects – at least to some degree – the individual's right to vote and his right to associate with others for political ends." . . . Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently. . . . Accordingly, the mere fact that a

> State's system "creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny." . . .
>
> Instead, . . . a more flexible standard applies. A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." . . .
>
> Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." . . . But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions. . . .

Id. at 433-34 (citations omitted).

In evaluating interests underlying state election laws "a particularized showing" is not required. *Munro v. Socialist Workers' Party*, 479 U.S. 189, 195-96 (1986):

> To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the "evidence" marshalled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

IV. ALASKA'S BLANKET PRIMARY AND VOTER REGISTRATION PATTERNS

A discussion of the constitutionality of state primary elections must begin with an explanation of the three major types of primary election systems. They are the closed primary, the open primary, and the blanket or nonpartisan primary. The defining feature of a closed primary is that only members of a given political party may participate in the party's primary election. Some closed primaries require affiliation with the party for a period of time prior to the primary election, while in others a voter may declare an affiliation at the time of voting in the primary. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 222 n.11 (1986). In an open primary, any voter may vote for candidates for any party's nomination, but the voter may only vote for candidates running for one party's nomination. *Id.* In a blanket primary,

any voter may also vote for candidates for any party's nomination, but the voter may vote for candidates for the nomination of different political parties for various offices. *Id.* Thus, in Alaska's blanket primary a registered Republican might vote for an Alaskan Independence Party candidate for Governor, a Republican for United States House of Representatives, and a Democrat for State Senate. In 1986 the United States Supreme Court identified thirty-seven states with closed primaries of one sort or another, nine states with open primaries, and four states, including Alaska, with blanket primaries, called by the Supreme Court "nonpartisan" primaries. *Id.*

The RPA primary conducted under the stipulation in *Zawacki* is referred to by RPA as a "partially-closed primary." This seems apt since the primary is not a classic closed primary in that unaffiliated voters are allowed to participate, yet it does not meet the definition of an open primary, since it is not open to all registered voters.

Under the blanket primary system, Alaska's political parties have no formal role in the selection of candidates for the general election.[6,7] Any person may declare him or

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[6] There are two exceptions to this. When an incumbent dies or is disqualified before the primary election, or a nominee dies, withdraws, or is disqualified before the general election, ballot vacancies may be filled by party petition. AS 15.25.056, AS 15.25.110.

[7] That the Alaska Statutes do not entrust candidate selection to political parties is consistent with the scant attention given political parties in the Alaska Constitution. They are mentioned only twice, both in a limiting context. Art. IV, § 14 (justices and judges may not hold office in a political party); art. XII, § 4 (no person who belongs to any party which advocates

herself to be a candidate of a party in the primary election upon meeting certain prescribed legal requirements. The candidate must be "a member of the political party." This, by definition, "means a person who supports the political program of a party." AS 15.60.010(15). The candidate must be registered to vote as a member of the political party under whose name the candidate seeks nomination. AS 15.25.030(16). Registration can be accomplished on the day of the declaration. AS 15.07.040. All the candidates for a given office are listed on a single ballot with their party affiliation. Any voter, regardless of party affiliation, may vote for any candidate. Where there are two or more candidates seeking nomination under a single party's name, the candidate who receives the most votes advances to the general election.[8,9]

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the overthrow by force or violence of the government is qualified to hold any public office).

[8] Political parties have automatic access to the blanket primary ballot. A political party is defined as "an organized group of voters that represents a political program and that nominated a candidate for governor who received at least three percent of the total votes cast at the preceding general election for governor. . . . AS 15.60.010(20). In 1992, Alaska had four political parties, RPA, the Democratic Party of Alaska, the Alaskan Independence Party, and the Green Party. The smaller parties sometimes play an important role in Alaska politics. For example, in 1992 the incumbent governor was the nominee of the Alaskan Independence Party.

[9] Candidates may gain access to the general election ballot by becoming the nominee of a party in the blanket primary or, in 1992, by petition. AS 15.25.140-.200 (1992). Effective in 1995, candidates of a political "group" – an organization which represents a political program and which does not qualify as a party, AS 15.60.010(19) – may gain access to the blanket primary ballot by petition. AS 15.25.190 (1995).

The blanket primary was first enacted in Alaska in 1947 following a referendum. Memorandum from Gordon S. Harrison, Director, Legislative Research Agency, Research Request 90.294 (May 23, 1990). The subsequent history of the blanket primary is related by Harrison:

> Increasingly, . . . the question of the blanket primary became a partisan issue. Democrats tended to oppose it; Republicans to support it. Democrats believed that it eroded what little party loyalty and discipline existed in Alaska, and they thought the Republicans used it to their advantage by crossing party lines in the primary to elect the weakest Democratic candidate. Republicans supported the blanket primary in hopes that Republican candidates would benefit by attracting conservative Democrats and nonaligned voters.
>
> Despite the overall partisan flavor that the issue was to acquire (with Republicans for and Democrats against the blanket primary), opposition existed on the part of some Republicans, and support existed on the part of some Democrats. In general, party stalwarts and those who believe in the importance of strong parties in the political process, opposed and continue to oppose the blanket primary. Those who are not firmly aligned with a political party, and who believe that the voter should have maximum independence in balloting matters, support the blanket primary. Party loyalty has not been strong in Alaska, and legislators from both parties have responded to widespread public support for the blanket primary.
>
> In the first session of the first state legislature in 1959, when Democrats firmly controlled both

houses and the governor's office, the blanket primary was replaced by the single ballot open primary. Adoption of the comprehensive election code in 1960 incorporated this change.

Republicans led the opposition to the single ballot open primary, although many Democrats also sought a return to the blanket primary. Several bills were introduced to restore the blanket primary, but they languished in Democratic-controlled committees. In 1966, during the second session of the Fourth Legislature, a blanket primary bill passed the House and almost passed the Senate. Senate debate on the measure was reported in the *Anchorage Daily Times*. Democrats Jim Nolan of Wrangell, Robert Blodgett of Teller, and Robert Ziegler of Ketchikan spoke in favor the bill. Senator Blodgett is quoted saying:

> The Democratic party is a hollow shell. The Republican party is a hollow shell. How many people actually are active workers in the two parties? Darned few. I support the bill.

Senator Ziegler is reported to have said:

> The measure is vitally important to the people of this state. In Ketchikan, probably nine of every ten voters want to vote for the man, not the party.

Despite this bipartisan show of support, the bill failed to pass the Senate.

The general election of 1966 broke the Democratic monopoly on legislative power which had existed since the 1950s: Republican majorities were elected to both Houses and Republican Walter Hickel was elected governor.

> The blanket primary was thereupon restored during the first session of the Fifth Legislature. The bill to restore the blanket primary was introduced at the request of Governor Hickel, but it attracted considerable bipartisan support. Among the 35 yeas in the House, nine were cast by Democrats; of the five nays, four were cast by Democrats. In the Senate the bill received 18 yeas, four of which were cast by Democrats. Both nays in the Senate were cast by Democrats.
>
> The blanket primary seems to suit Alaska, where party ties and party organizations are weak. However, some Democratic and Republican party loyalists, who lament the decline of political parties, prefer a more conventional (open or closed) primary that restricts voters to casting ballots for one party's candidates.

Id. (footnotes omitted).

In 1994[10] there were 340,464 registered voters in Alaska. Of these more than 182,000 voters were registered as nonpartisan or undeclared. By contrast, there were 78,212 registered Republicans, 59,782 registered Democrats, 12,936 registered Alaskan Independence Party members, 2,558 Green Party members, and 4,595 "other" party members. Thus approximately fifty-four percent of all registered voters in Alaska were nonpartisan or undeclared, whereas approximately twenty-three percent were registered Republicans and approximately eighteen percent were registered Democrats.

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[10] We quote 1994 figures because they are the figures used by the parties in their briefs. The 1992 figures do not differ significantly in the relative distribution of registered voters.

V. THE MERITS

A. Relevant Case Law

We turn now to a discussion of the major cases on which the parties rely. Most directly on point from a factual standpoint is *Heavey v. Chapman*, 611 P.2d 1256 (Wash. 1980). In *Heavey*, the Supreme Court of Washington affirmed the constitutional validity of Washington's blanket primary against a challenge by the State Democratic Central Committee on freedom of association grounds. The Washington court considered two recent United States Supreme Court cases, *Rosario v. Rockefeller*, 410 U.S. 752 (1973) and *Nader v. Schaffer*, 417 F. Supp. 837 (D. Conn.), *aff'd*, 429 U.S. 989 (1976). In both of those cases the United States Supreme Court upheld statutes establishing closed primary elections against challenges brought by excluded voters. The *Heavey* court pointed out that these cases did not "establish any mandatory duty that a state must have closed primaries nor do they forbid a blanket primary." 611 P.2d at 1259 (emphasis omitted). The court quoted language from Nader which implies that primary systems which permit members of other parties to vote in a party's primary are constitutional: " '[Other states] have provision [sic] for primaries which allow participation by independents and members of other parties. There is no suggestion that such a clause makes the election laws unconstitutional . . . ' " *Id.* at 1258 (quoting *Nader*, 417 F. Supp. at 849-50).

While the *Heavey* court found the plaintiffs failed to show a substantial burden to their associational rights, it found that there were compelling interests which supported the blanket primary. It identified three: (1) secrecy

– "allowing each voter to keep party identification, if any, secret"; (2) greater voter participation – "allowing the broadest possible participation in the primary election"; and (3) maximizing voter choice – "giving each voter a free choice among all candidates in the primary." *Id.* at 1259.

Subsequent to the Washington Supreme Court's decision in *Heavey* the United States Supreme Court ruled on one aspect of a state's open presidential preference primary in *Democratic Party of the United States v. Wisconsin ex rel. LaFollette,* 450 U.S. 107 (1981). Under Wisconsin's election statute non-Democrats, including members of other parties and independents, were allowed to participate in the Democratic Party presidential candidate preference primary. *LaFollette,* 450 U.S. at 109-10. Voters did not vote for delegates to the national convention; delegates were chosen at party caucuses. However, Wisconsin law required that the delegates be bound by the results of the open primary. Democratic National Party rules, on the other hand, required that only closed primaries could bind delegates to vote for a particular candidate. The State of Wisconsin sought a declaration that the Wisconsin delegate selection system was constitutional and binding on the Democratic National Party. The Wisconsin Supreme Court held that the state's system was constitutional and binding on the National Party. *Democratic Party of United States v. Wisconsin ex rel. LaFollette,* 287 N.W.2d 519 (Wis. 1980), *rev'd,* 450 U.S. 107 (1981). On appeal, the United States Supreme Court defined the issue not as whether Wisconsin might conduct an open primary, but whether "the State may compel the National Party to seat a delegation chosen in a way that violates the rules of the

Party." 450 U.S. at 121. The Court answered this question in the negative. It held that a state may not control how a national party selects its national convention delegates. *Id.* at 126. In so holding, however, the Court acknowledged that the Wisconsin open primary might serve the compelling state interest of encouraging greater voter participation:

> The Wisconsin Supreme Court considered the question before it to be the constitutionality of the "open" feature of the state primary election law, as such. Concluding that the open primary serves compelling state interest by encouraging voter participation, the court held the state open primary constitutionally valid. *Upon this issue, the Wisconsin Supreme Court may well be correct.*

Id. at 120-21 (emphasis added). Similarly, the Court recited without casting doubt on their validity the interests asserted by the State of Wisconsin as compelling:

> The State asserts a compelling interest in preserving the overall integrity of the electoral process, providing secrecy of the ballot, increasing voter participation in primaries, and preventing harassment of voters. But all those interests go to the conduct of the Presidential preference primary – not to the imposition of voting requirements upon those who, in a separate process, are eventually selected as delegates. . . .
>
> The State has a substantial interest in the manner in which its elections are conducted, and the National Party has a substantial interest

> in the manner in which the delegates to its National Convention are selected.

Id. at 124-26 (footnotes omitted).

The case most heavily relied upon by the RPA is *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986). Connecticut had a closed primary. The Republican Party of Connecticut adopted a rule broadening the franchise for Republican Party primaries to include voters who were not registered as members of any other political party. *Tashjian*, 479 U.S. at 210. The party sought a declaration that the Connecticut closed primary statute violated the party's freedom of association. *Id.* The United States District Court issued such a declaration, which was affirmed by the United States Court of Appeals and by the United States Supreme Court. *Id.* at 211. Thus, the Supreme Court found the closed primary statute unconstitutional. The Supreme Court began its discussion with cautionary language, warning against generalization and prescribing a balancing approach:

> We begin from the recognition that "[c]onstitutional challenges to specific provisions of a State's election laws . . . cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). "Instead, a court . . . must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.

> In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights." 460 U.S. at 789.

Id. at 213-14.

Identifying the nature of the party's interest as one of freedom of association, the Court observed that the Connecticut closed primary statute "places limits upon the group of registered voters whom the Party may invite to participate in the 'basic function' of selecting the Party's candidates." *Id.* at 215-16 (citing *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973)). For a number of reasons, the Court found these limits were not justified by the reasons offered by the State.

First, the Connecticut closed primary did little to prevent "raiding," since under the statute an Independent could reregister as a Republican and vote in the closed primary as late as the day before the primary election.[11] *Id.* at 219. Second, the closed primary was said to avoid voter confusion since the legislature could determine that " 'it would be difficult for the general public to understand what a candidate stood for who was nominated in part by an unknown amorphous body outside the party, while nevertheless using the party name.' " *Id.* (quoting Brief for Appellant 59). This rationale was found

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[11] The Court defined raiding as the practice " 'whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary.' " 479 U.S. at 219 (quoting *Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973)).

to be inconsistent with the facts since any candidate in the Republican primary had to have received at least twenty percent of the vote at a prior party convention. *Id.* at 220-21. Further, the alleged interest in informed voter decisions, while found to be legitimate, was secondary to the benefit to the party of a broader electorate:

> Given the numerical strength of independent voters in the State, one of the questions most likely to occur to Connecticut Republicans in selecting candidates for public office is how can the Party most effectively appeal to the independent voter? By inviting independents to assist in the choice at the polls between primary candidates selected at the Party convention, the Party rule is intended to produce the candidate and platform most likely to achieve that goal. The state statute is said to decrease voter confusion, yet it deprives the Party and its members of the opportunity to inform themselves as to the level of support for the Party's candidates among a critical group of electors.

Id. Finally, the Court stressed that a basic objective of closed primary statutes was to protect parties from external disruption in order to promote responsiveness by elected officials to political parties. The court found this goal to be insubstantial in light of the party's decision that it did not desire such protection:

> The statute in *Storer [v. Brown,* 415 U.S. 724, 736 (1974)] was designed to protect the parties and the party system against the disorganizing effect of independent candidacies launched by unsuccessful putative party nominees. This protection, like that accorded to parties threatened

> by raiding in *Rosario v. Rockefeller* . . . is undertaken to prevent the disruption of the political parties from without and not, as in this case, to prevent the parties from taking internal steps affecting their own process for the selection of candidates. The forms of regulation upheld in *Storer* and *Rosario* imposed certain burdens upon the protected First and Fourteenth Amendment interests of some individuals, both voters and potential candidates, in order to protect the interests of others. In the present case, the state statute is defended on the ground that it protects the integrity of the Party against the Party itself.

Tashjian, 479 U.S. at 224.

B. The Blanket Primary is Not Per Se Unconstitutional

The regulations adopted by Alaska's lieutenant governor following the *Zawacki* stipulation appear to assume that the blanket primary statutory system is per se unconstitutional when it conflicts with party rules regarding the selection of political party candidates.[12] Although

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[12] 6 AAC 28.100 provides in relevant part: "The purpose of this chapter is to provide a means to implement political party rules that violate AS 15.25.060 (the blanket primary statute), but that must be implemented in accordance with a political party's constitutional associational rights." Similarly, 6 AAC 28.150 provides in relevant part: "The director of elections will implement political party rules regarding selection of political party candidates adopted after 10/23/93 that must be implemented in accordance with a political party's constitutional associational rights. . . . "

some commentators have taken a like position,[13] it is not supported by the case law.

Tashjian does not confer per se validity on party rules which conflict with a state's primary election laws. Indeed, it disavows any such scope: "Our holding today does not establish that state regulation of primary voting qualifications may never withstand challenge by a political party or its membership." 479 U.S. at 224 n.13. While *LaFollette* seems to uphold a party rule over a statute, it is distinguishable because the Court did not invalidate the state open primary. The Court in *LaFollette* held that the state could not control the delegate selection process of a national party for national conventions. As one commentator has stated:

> One alternative and quite legitimate interpretation bases . . . *LaFollette* on principles of federalism and extraterritoriality. On this reading, the reason for permitting the decisions of the national convention to prevail over state

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[13] *See, e.g.*, David Lubecky, *Setting Voter Qualifications for State Primary Elections: Reassertion of the Right of State Political Parties to Self-Determination*, 55 U. Cin. L. Rev. 799, 830 (1987) ("When a state political party decides to nominate its candidates for public office in an open or closed primary election contrary to a state law, the fundamental constitutional right of political association mandates that the party's choice of primary form prevail."); Arthur M. Weisburd, *Candidate-Making and the Constitution: Constitutional Restraints on and Protections of Party Nominating Methods*, 57 S. Cal. L. Rev. 213, 281 (1983-84) ("To summarize, statutes compelling parties to choose candidates in primary elections appear to be unconstitutional. The cases make clear that a political association has a first amendment right to determine for itself how it will conduct its affairs. Statutes requiring primaries clearly deny that right.").

> laws is that otherwise inconsistent state requirements could make it difficult for the national party to function or act coherently.

Daniel L. Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 Tex. L. Rev. 1741, 1772 (1993).

Furthermore, post-*Tashjian* decisions have not given *carte blanche* authority to political parties to rewrite state primary election rules. For example, in *Lightfoot v. Eu*, 964 F.2d 865 (9th Cir. 1992), *cert. denied*, 507 U.S. 919 (1993), the court was presented with an assertion by the Libertarian Party of California that the party was entitled to nominate candidates in contravention of the primary election system mandated by state law. The court rejected this position because it was outweighed by the purpose of the direct primary requirement which was to reduce party influence in favor of that of voters:

> The State justifies the direct primary requirement as a Progressive Era reform designed "to take political nominations out of the smoke-filled rooms of party bosses and give them to the voters." The direct primary was one of several measures conceived of by the Progressives to destroy what they viewed as "the corrupt alliance" between wealthy special interests and the political machine. Richard Hofstadter, *The Age of Reform* 257 (Vintage Books 1955). The Progressives believed democracy should be something greater than competition between political parties. *Id.* at 263. They viewed the direct primary as a vital weapon in their battle to "make government accessible to the superior disinterestedness and honesty of the average

> citizen. Then, with the power of the bosses broken or crippled, it would be possible to check the incursions of the interests upon the welfare of the people and realize a cleaner, more efficient government." *Id.* at 257. We can imagine no government interest more compelling. Though honest people may debate the success of the direct primary in producing the kind of government the Progressives envisioned, it is a means sufficiently tailored to its ends to satisfy the Constitution. Indeed, if the goal of California's Progressive reformers was to deliver power over the political process from the hands of party bosses and special interests into those of the people, no measure short of the direct primary would be adequate. We therefore hold that the State's interest in enhancing the democratic character of the election process overrides whatever interest the Party has in designing its own rules for nominating candidates.

964 F.2d at 872-73. The court also observed that the "assertion that 'legislative restrictions on the right of a ballot-qualified political party to adopt its own procedures for self-governance including nomination of candidates constitute a substantial impairment of the rights of the party and its members to freedom of association,' " while finding some support, overstated the breadth of the holdings of the cases on which the assertion was based, including *Tashjian* and *LaFollette*. 964 F.2d at 871.

In *Green Party of California v. Jones*, 37 Cal. Rptr. 2d. 406 (Cal. App. 1995), the Green Party of California had adopted a rule bestowing upon itself the authority to close the primary election for Green Party candidates as

to specified offices. This rule conflicted with the California election code which allowed any qualified member of the party to seek the nomination of the party for any open office. The party asserted the closure right in order to avoid functioning as a "spoiler" in close races between major party candidates. 37 Cal. Rptr. at 410. The court found the Green Party's assertion that it would be injured in its associational interests to be plausible, *id.* at 413, but outweighed by the state's interests "in the uniformity of ballot procedures to prevent voter confusion, to minimize administrative burdens, and to forestall control by party governing bodies." *Id.* at 415.

C. The State's Interests Justify the Restrictions Imposed on RPA's Rights.

RPA claims the right to designate those voters who may vote for Republican candidates in a primary election. The party rule requiring a partially-closed primary election reflects an effort to implement this right. RPA claims that a partially-closed primary advances – and that a blanket primary harms – its interests in two ways. First, it claims that the partially-closed primary is a means by which RPA is able to "protect itself against raiding." Second, RPA contends that the partially-closed primary results in the election of candidates who are more accountable to party "principles and platform" and permit the party "to increase the amount of control [it] would have over elected officials. . . . "[14]

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[14] These mirror two of the interests advanced by the State of Connecticut in its effort to defend the closed primary in *Tashjian*, 479 U.S. at 219-21.

The State and AVOP counter that the harms which RPA identifies are not substantially greater under a blanket primary than they would be under the RPA's partially-closed primary. They point out that under the latter RPA members constitute less than a third of the total eligible voters and thus considerable potential for raiding exists. Further, they note that a voter may change party registration immediately before voting in the partially-closed primary, which also facilitates raiding.[15] The State and AVOP also argue that the loss of candidate accountability to party principles and party direction is not substantially greater under the blanket primary than under the partially-closed primary, given that fewer than a third of the potential voters in the partially-closed primary are RPA members.[16]

In our view there is merit to the State's and AVOP's position that the danger of raiding exists under the partially-closed primary and that the danger is potentially increased only by a matter of degree by a blanket primary. Still, it seems plausible that registered voters in other parties might be more apt than independent or

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[15] AVOP points to language in *Tashjian* in which the Court observed that a Connecticut statute which permitted re-registration on the day before the primary election facilitated raiding. 479 U.S. at 219.

[16] RPA suggests that this case should be remanded for fact finding unless this court rules in RPA's favor. We do not believe that fact finding is necessary or appropriate in this case. The issues are issues of law; the interests advanced in support of and in opposition to the blanket primary are not especially amenable to courtroom proof and such proof is not, in any case, required. *Munro v. Socialist Workers' Party*, 479 U.S. 189, 195-96 (1986).

nonpartisan voters to vote against an opposing party candidate in a primary for tactical reasons. Further, the partially-closed primary deters raiding in one way that the blanket primary does not. A partisan voter who switches party allegiances just before the election in order to cast a raiding vote must give up the right to vote for candidates of his or her choice in races in which he has no desire to raid.

The Supreme Court, writing in *Tashjian* in 1986, quoted from a study which concluded that "the existence of 'raiding' has never been conclusively proven by survey research." 479 U.S. at 219 n.9. We have been referred to no studies contradicting this conclusion. However, we believe that at least on a small scale and in some races some opposition party voters will vote for a candidate whom they have no intention of supporting in the general election.[17] Thus we believe that raiding is a legitimate concern, even though its effects may be exaggerated. Further, while raiding is readily possible under either the partially-closed primary or the blanket primary, more raiding is apt to occur in the latter system.

With respect to the second harm, loss of elected officials' accountability to party principles and party control, the State and AVOP's arguments that this loss is only slightly greater with the expanded franchise of the blanket primary seem correct.

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[17] Of course, some voters will cast primary votes outside their party because they support the candidate for whom they are voting and intend to vote for that candidate in the general election.

Among the reasons offered by the State in support of the blanket primary are that it encourages voter turnout, maximizes voters' freedom of choice among candidates, and tends to ensure that the "officers elected are representative of the people to be governed" in that it "forces the major political parties to have a broad cross-section of support from the voters."[18] These three benefits are seen

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[18] The State's justifications are largely reflected in a resolution passed by the Alaska State Legislature in 1992:

> WHEREAS Alaskans have a proud tradition of freedom and independence and reflect that tradition in the manner in which they exercise their franchise; and
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> WHEREAS in excess of 55 percent of all registered voters in Alaska have chosen not to affiliate with an organized political party; and
>
> WHEREAS this tradition is reflected in the open primary system that has been used since 1968 and is open to all voters, allowing maximum participation and freedom of choice in the electoral process; and
>
> WHEREAS there has been a national decline in voter registration and participation in the electoral process, particularly among young people who are less likely to identify with political parties; and
>
> WHEREAS forcing voters to vote an exclusively partisan ballot that eliminates the current wide range of choices may discourage them from voting; and
>
> WHEREAS Alaska's primary elections already have significantly lower voter turnout than general elections even under an open unrestricted system of voting and this level will likely be even further reduced by a closed primary; and
>
> WHEREAS the State of Alaska and its agencies have a consistent record of encouraging voter registration and participation in elections; and

by the State to have special importance in view of the fact that most voters in Alaska are nonpartisan or undeclared.

The benefits inherent in a blanket primary of greater voter participation and voter free choice among all candidates were recognized by the Washington Supreme Court as compelling in *Heavey*, 611 P.2d at 1259. Voter free choice is better accomplished in a blanket primary than in an open primary:

> [T]he state interest in allowing voters to support the candidates of their choice in a primary can

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> WHEREAS among the stated goals of closing primaries are strengthening parties and providing greater party discipline, both of which run counter to Alaska voting traditions; and
>
> WHEREAS in the current open election process Alaskans have the option of voting for the person they prefer for each separate office, while a closed primary will limit voters' opportunity to vote for the candidates of their choice; and
>
> WHEREAS there will be a significant added cost to the state to print ballots for each separate party primary;
>
> BE IT RESOLVED that the Alaska State Legislature opposes a change to Alaska's open primary election system and affirms support for maintaining our open primary; and be it
>
> FURTHER RESOLVED that the Alaska State Legislature encourages the governing bodies of the political parties to reconsider their decisions to hold separate closed primaries that force limitations and restrictions on Alaska voters.

1992 Legislative Resolve No. 67 (SCR 30). This resolution was passed unanimously in the Senate, and by a vote of 35 to 5 in the House. 1992 Senate Journal 2143; 1992 House Journal 3169-70.

> be achieved only by the blanket primary which allows complete voter freedom in alternating votes between parties, since an open primary, on the other hand, restricts a voter to candidates of only one party.

Id.

The goal of greater voter participation is one shared by blanket and open primaries. *See LaFollette,* 450 U.S. at 120-24.

The objective of ensuring that officers elected are representative of a broad cross-section of the electorate, rather than accountable to the narrower interests which may control a party organization, is in essence the reason for the shift, begun at the turn of the century and now generally prevalent, from nomination by party convention to nomination by direct primary. *See Lightfoot,* 964 F.2d at 872; Note, *Setting Voter Qualifications For State Primary Elections,* 55 U. Cin. L. Rev. 799-800 (1986-87). In Alaska, where a majority of voters are not affiliated with any party, a closed or partially-closed primary system can plausibly be viewed as bestowing on a minority of the electorate a disproportionately powerful role in the selection of public officeholders. If political parties and politically affiliated voters are to have more power in the election process, that is power taken from unaffiliated voters.

Taken individually and collectively these justifications seem to us to be legitimate and important. Collectively they outweigh the harms to RPA's associational interests claimed in this case.

It is interesting that the "harm" claimed by RPA of loss of responsiveness of elected officials to party principles and party discipline is much the same as the "benefit" claimed by the State of nominating candidates whose appeal is to a broad cross-section of the electorate. This illustrates that this case reflects in part conflicting visions of democracy. On one side are what one commentator calls "party renewal advocates" whose view is that government works best when elected officials are accountable to party principles and party discipline.[19] On the other are those who agree with the turn-of-the-century Progressives who had a "vision of a democracy purged of corruption by placing widely dispersed power in the hands of common men and women."[20]

Obviously, both visions have strengths and weaknesses, and it is not the function of any court to resolve them. The important point for our purpose is that the Alaska Legislature has taken a position. In so doing it has exercised a power which only it can exercise, and its choice is both reasonable and nondiscriminatory.

VI. REMEDY

O'Callaghan seeks a declaration that the 1992 and 1994 primary elections were conducted illegally; prospective relief that requires future primaries to be conducted in accordance with the Alaska Statutes; and a damage remedy under which the State would pay each voter $50

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[19] Lowenstein, *supra*, at 1769-70, 1790-91.

[20] *Id.* at 1791.

for each of the illegal elections in which the voter participated.

O'Callaghan is entitled to a judgment declaring the 1992 and 1994 primaries to have been illegally conducted. The remedy goes no further than this. New elections will not be ordered. The acts of officials who were nominated in those primaries will not be invalidated. O'Callaghan is also entitled to prospective mandatory relief requiring that the 1996 primary be conducted in accordance with the Alaska Statutes.[21] The damage remedy which he requests is not supported by any recognized principle of law and will not be afforded.

VII. CONCLUSION

We hold that Alaska's blanket primary statute is constitutional. A state's election statute does not violate the first amendment associational rights of a political party solely by virtue of the fact that the statute conflicts with

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[21] The remedy in this case is similar to that afforded in *Coghill v. Boucher*, 511 P.2d 1297, 1304 (Alaska 1973). In *Coghill* we concluded that certain ballot counting regulations were invalid. We remanded with directions for entry of a declaration that the regulations were invalid and an order prohibiting the lieutenant governor from conducting future elections under the invalid regulations. We particularly noted: "In fashioning appropriate relief for appellants, however, we are not obliged to invalidate the . . . election in which ballots were tallied in accordance with [the invalid regulations]." *Id.* In the present case the appellant does not expressly seek to set aside an election. We therefore state no view as to whether or under what circumstances such relief might be available.

party rules pertaining to the primary. The blanket primary is nondiscriminatory. While the blanket primary may create some degree of interference with RPA's associational rights, this interference is minor and is justified by the State's interests.

A blanket primary statute may harm the RPA in terms of creating a greater chance of raiding than under a partially-closed primary, though its real effect has not been shown and may not be as extreme as the party argues. Further, there is only a slightly greater loss of accountability of candidates to party principles under the blanket primary as compared to the partially-closed primary. The harm is not great and is justified by the State's interests.

The State's interests in encouraging voter turnout, maximizing voters' choice among candidates, and ensuring that elected officials have relatively broad based constituencies are served by the blanket primary statute. These interests are important and are legitimate objectives for a state to seek to achieve when structuring election procedures.

We reverse the decision of the superior court granting summary judgment upholding the regulations under which the 1992 primary election was conducted. Having previously rejected the arguments that the challenged regulations should be upheld because of the federal court stipulation or because the blanket primary statute is clearly unconstitutional, we conclude that the blanket primary statute is constitutional and thus the regulations under which the 1992 and 1994 elections were conducted

are invalid. A declaratory judgment is entered accordingly. The 1996 primary shall be conducted under the Alaska Statutes. O'Callaghan's damage claim is denied.

REVERSED.

RABINOWITZ, Justice, dissenting.

I dissent from the court's conclusion that the blanket primary statute is constitutional. In my view Alaska's blanket primary statute impermissibly burdens the Republican Party of Alaska's political rights of association in violation of the First and Fourteenth Amendments to the United States Constitution.[1]

Initially I think it appropriate to observe that in accordance with controlling federal precedent this court must apply strict scrutiny in determining the constitutionality of Alaska's blanket primary statute. I rely on *Burdick v. Takushi*, 504 U.S. 428 (1992), *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), and *Democratic Party of the United States v. Wisconsin, ex rel. LaFollette*, 450 U.S. 107 (1981), in concluding that the compelling interest standard is controlling in

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[1] Freedom of association has been described by the Supreme Court of the United States as among the preferred rights deemed by implication from the First Amendment's guarantees of speech, press, petition and assembly. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Buckley v. Valeo*, 424 U.S. 1 (1976). *See also* L. Tribe, American Constitutional Law 101 (2d ed. 1988).

resolving issues of federal constitutionality in the factual context of this case.[2]

Burdick contains the most relevant text. There, the Supreme Court wrote:

> [T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. *Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance."* But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions.

Burdick, 504 U.S. at 434 (emphasis added) (citation omitted).

The *Burdick* court applied the latter, lower level of scrutiny, and held the Hawaii election laws to be constitutional. *Burdick* explains its application of the less strict test by stating:

> There is no doubt that the Hawaii election laws, like all election regulations, have an impact on the right to vote, but it can hardly be said that the laws at issue here unconstitutionally limit access to the ballot by party or independent

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[2] In reviewing the superior court's interpretation of a constitutional provision, this court applies its independent judgment. *Arco Alaska Inc. v. State*, 824 P.2d 708, 710 (Alaska 1992).

> candidates or *unreasonably interfere with the right of voters to associate and have candidates of their choice placed on the ballot.*

Id. (emphasis added) (citation omitted).

In the case at bar, the blanket primary statute does specifically interfere with the right of the Republican Party of Alaska to have candidates of its choice placed on the primary ballot. That is, the statute prohibits the Republican Party of Alaska from selecting candidates according to its chosen method. The clear implication of *Burdick* is that Alaska's blanket primary statute is subject to strict scrutiny.

Equally clear is Eu. There, the Supreme Court struck down California laws that barred the parties from endorsing candidates in primary elections. Justice Marshall, writing for the court, stated, "If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest and is narrowly tailored to serve that interest." Eu, 489 U.S. at 222 (citation omitted). He continued:

> It is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments. Freedom of association means not only that an individual voter has the right to associate with the political party of her choice, but also that a political party has a right to " 'identify the people who

> constitute the association,' " and *to select a "standard bearer who best represents the party's ideologies and preferences."*

Eu, 489 U.S. at 224 (emphasis added) (citations omitted).

Thus, according to Eu, the party has the right to select its own nominee, and any attempt to infringe on that right is subject to strict scrutiny.

Tashjian contains similar language. There, Justice Marshall wrote:

> The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote, or, as here, the freedom of political association.

Tashjian, 479 U.S. at 217 (citation omitted). Justice Marshall then applied strict scrutiny to the Connecticut statute, and found it unconstitutional. *LaFollette* also supports this proposition. There the Supreme Court did not specifically state whether strict scrutiny applied. However, it mentions "compelling interest[s]," which implies that strict scrutiny applied to the case. *LaFollette*, 450 U.S. at 124-125.

To understand why Alaska's blanket primary statute has the effect of prohibiting the Alaskan Republican Party from nominating candidates of its choice, it is necessary to review the operation of Alaska's primary election laws. In this regard AS 15.25.010 states:

> Candidates for the elective state executive and state and national legislative offices *shall* be nominated in a primary election by direct vote

> of the people in the manner prescribed by this chapter.

(Emphasis added.) Therefore, parties must participate in the primary election. A "political party" is defined as

> an organized group of voters that represents a political program and that nominated a candidate for governor who received at least three percent of the total votes cast at the preceding general election for governor. . . .

AS 15.60.010(20).

Further, parties have no formal control over who can claim the party mantle in a primary. This is because AS 15.25.030, which governs the declaration of candidates, grants the party no role.[3] Specifically, the only formal affiliation which the statute requires between the party and a candidate seeking office under the name of that party is that the candidate "is registered to vote as a member of the political party whose nomination is being sought." AS 15.25.030(a)(16).

Thus, under Alaska law, a party is compelled to participate in the primary election. Furthermore, a party cannot make its own selection of who will represent it in the primary election.[4] Therefore, the primary is the only

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[3] Parties can nominate the candidate of their choice in exceptional circumstances, such as death of the winner of the primary. AS 15.25.110.

[4] If, for example, only those candidates who received a certain percentage of votes at a party convention or caucus could run in the primary under the party's name, then the party would be assured that the nominees have received at least some affirmative approval from the party. As it stands, the party has no control over which candidates use its name.

mechanism available for the party to choose its nominee. And as a result of the blanket primary statute, the party cannot select who will vote for its nominee.[5]

Taken together, these laws mandate that any organization which wins more than three percent in the prior election for governor loses the right to nominate the candidate of its choice. A law requiring such a result can only be justified when it is narrowly drawn to advance an interest of compelling importance to the state, according to *Tashjian, Eu,* and *Burdick.* Indeed, in *LaFollette,* the Supreme Court approvingly cited Professor Tribe for the following proposition:

> Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the

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[5] The same rules do not apply to non-party "political groups" which run candidates in the primary. AS 15.60.010(19) defines a "political group" as "a group of organized voters which represents a political program and which does not qualify as a political party." Political groups are free to choose their candidates in any way they see fit. If the group then obtains the proper number of signatures on a petition, AS 15.25.140, .160-.170, the candidate is placed on the primary election ballot. AS 15.25.190. Therefore, a political group can nominate its own candidate, since it is not bound by AS 15.25.030(a). Since the group will presumably run a petition drive for only one candidate per office, that candidate will be that group's nominee in the general election. Thus, by having the right to choose who will bear its name in the *primary election,* a group can place a candidate in the general election without having to tally the opinions of unwanted voters.

I do not address whether a political party is allowed to dissolve itself and reconstitute itself as a political group in order to choose nominees of its own choice.

> interests and persuasions that underlie the association's being.

LaFollette, 450 U.S. at 122 n.22.

Thus, it is within the province of a party to decide who will nominate its candidates. Other language in the *LaFollette* opinion makes this point, as well. In footnote 25 of the *LaFollette* opinion the Court acknowledges that a party's rules may not necessarily induce party loyalty more effectively than the state's proposed rule. However, "the stringency, and wisdom, of membership requirements is for the association and its members to decide – not the courts – so long as those requirements are otherwise constitutionally permissible."

In my view, *Tashjian* and *LaFollette* compel the holding that Alaska's blanket primary statute is unconstitutional. The Supreme Court or the United States held in *LaFollette* that the State of Wisconsin could not control the delegate selection process of a national party for national conventions. More particularly, the Supreme Court held that Wisconsin could not force the party to accept a state mandated process for selecting candidates. I cannot distill from *LaFollette* a distinction between the process for selecting delegates and the process for selecting actual candidates. *LaFollette* states, "It is for the National Party – and not the Wisconsin Legislature or any court – to determine the appropriate standards for participation in the Party's *candidate selection process.*" *LaFollette*, 450 U.S. at 124 n.27 (emphasis added). Delegates select candidates, and therefore interference in the delegate selection

process is interference in the candidate selection process. The Supreme Court recognized this.[6]

In *Tashjian*, the state wanted to keep the candidate selection process closed, while the Party wanted to allow some outsiders to vote. In *LaFollette*, the state wanted to keep the candidate selection process open, while the Party wanted to close the process to outsiders. It is critical to note that, in each case, the Party's desires prevailed over the state's asserted interests in closing or opening the process. I think that these cases cannot be distinguished in any meaningful way from the case at hand, and that they require this court to rule in favor of the Party.

Further, I disagree with the majority's statement that "there is merit to the State's and AVOP's position that the danger of raiding exists under the partially-closed primary and that the danger is increased only by a matter of degree by a blanket primary." Under the scheme favored by the Republican Party of Alaska, there is little risk of raiding. I say this for two reasons.

First, rules of the Republican Party of Alaska's scheme do not permit raiding for the simple reason that they do not permit Democrats to vote. Under the majority's definition, raiding occurs when "voters in sympathy

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[6] It is true that the Supreme Court recognized that the state had certain interests in providing for an open primary, so long as the political party was not forced to abide by the results. *See LaFollette*, 450 U.S. at 126 ("But if Wisconsin does open its primary, it cannot require that the Wisconsin delegates to the National Party Convention vote there in accordance with the primary results, if to do so would violate Party rules.").

with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary." This implies a degree of sabotage, where members of one party try to weaken the other party's position by voting for a weak candidate. The independents and unaffiliated voters who would be allowed to vote under the Republican Party of Alaska's rules are, by definition, not members of an opposing party, and there is no reason to think that they are in sympathy with another party. They do not seek to strengthen unaffiliated or independent candidates by sabotaging the Republican Party of Alaska's nominating process.

Second, the majority's definition of raiding necessarily implies that something is happening to the party that it does not want to happen. Thus, anything that the Republican Party of Alaska wants to happen in its nominating process cannot be characterized as raiding. By virtue of the fact that the Republican Party of Alaska has invited independents and non-affiliated voters to participate in its primary election, actions taken by those voters cannot be considered "raiding." Indeed, had the Republican Party of Alaska invited Democrats to participate in its primary, actions taken by the Democrats could not be fairly characterized as raiding.

The Professor Tribe quote referred to above illustrates this point. Again, he stated:

> Freedom of association would prove an empty guarantee if associations could not limit control over their decisions *to those who share the interests and persuasions* that underlie the association's being.

(Emphasis added.) Thus, associations are guaranteed the right to control who makes their decisions. If they invite non-members to participate, that is their right. And such participation therefore is not "raiding." It should be noted that the quote does not state only that the association should be able to limit control over their decisions to members, but speaks in more general terms of shared interests and persuasions – the precise group the Republican Party of Alaska hopes to attract and include in the primary.

As the Supreme Court of the United States emphasized in *Tashjian*:

> The nature of the appellees' First Amendment interest is evident. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization.

Tashjian, 479 U.S. at 214 (citations omitted).

In my opinion the State of Alaska has failed to demonstrate compelling state interests which outweigh the harms to the Republican Party of Alaska's constitutionally protected associational rights.[7] The State's objectives of encouraging voter turnout, insuring that elected

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[7] The Republican Party of Alaska need not defend the efficiency or wisdom of its rules, so long as they are otherwise constitutional. *LaFollette*, 450 U.S. at 123 n.25; *cf. Smith v. Allwright*, 321 U.S. 649 (1944) (barring "white primary" as unconstitutional).

officials are representative of the people to be governed, and accommodating the need for a broad cross-section of support from voters, cannot trump the Republican Party of Alaska's constitutionally protected associational interests in determining its own candidates, protecting itself against raiding, and insuring that its candidates are accountable to the Republican Party of Alaska's principles and philosophy.

I therefore conclude that since the State has failed to demonstrate compelling reasons for limiting the associational rights of the Republican Party of Alaska, the blanket primary statute is unconstitutional under the First and Fourteenth Amendments to the United States Constitution.[8]

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[8] Amicus Alaska Federation of Natives points out in its brief that if the current scheme is found unconstitutional, the remedy is not to force the State to run a primary for the Republican Party of Alaska under the Republican Party of Alaska's rules, but instead it is to allow the Republican Party of Alaska to opt out and run its own selection process – caucus, convention, or privately funded statewide primary – so long as the process chosen by the Republican Party of Alaska does not violate constitutional limitations.

IN THE SUPREME COURT OF THE STATE OF ALASKA

MIKE O'CALLAGHAN, Appellant, and JED WHITTAKER, ROBERT GIGLER, and ALASKAN VOTERS FOR AN OPEN PRIMARY, Appellants/Intervenors, vs. STATE OF ALASKA; LIEUTENANT GOVERNOR JACK COGHILL, in his official capacity as Lieutenant Governor, Appellee. and REPUBLICAN PARTY OF ALASKA, Appellee/Intervenor.	Supreme Court No. S-6249 ORDER (Filed Apr. 12, 1996)

Superior Court Nos. 3AN-92-08552/3AN-92-11150 Civil

Before: Compton, Chief Justice, Rabinowitz, Matthews and Eastaugh, Justices. [Fabe, Justice, not participating.]

On consideration of the joint emergency request for rehearing (modification of order), filed on March 29, 1996,

IT IS ORDERED:

1. The request for rehearing is GRANTED.

2. Opinion No. 4330, published on March 20, 1996, is WITHDRAWN.

3. Opinion No. 4338 is issued on this date in its place.

Entered by direction of the Court at Anchorage, Alaska on April 12, 1996.

CLERK OF THE
SUPREME COURT

/s/ Jan Hansen
JAN HANSEN

cc:

Justices
Judge Shortell
Appeals Division
Publishers (OP#4330 3/20/96)
BBS

Michael O'Callaghan
James L. Baldwin
John B. Gaguine
Jed Whittaker
Robert A. Gigler
Stephan H. Williams
Max Gruenberg
Edgar Boyko
Kenneth P. Jacobus

ALASKA STATUTES

A.S. 15.25.010. Provision for primary election. Candidates for the elective state executive and state and national legislative offices shall be nominated in a primary election by direct vote of the people in the manner prescribed by this chapter.

A.S. 15.25.030. Declaration of candidacy. (a) A member of a political party who seeks to become a candidate of the party in the primary election shall execute and file a declaration of candidacy. The declaration shall be executed under oath before an officer authorized to take acknowledgments and shall state in substance:

(1) the full name of the candidate;

(2) the full mailing address of the candidate;

(3) if the candidacy is for the office of state senator or state representative, the election or senate district of which the candidate is a resident;

(4) the office for which the candidate seeks nomination;

(5) the name of the political party of which the person is a candidate for nomination;

(6) the full residence address of the candidate, and the date on which residency at that address began;

(7) the date of the primary election at which the candidate seeks nomination;

(8) the length of residency in the state and in the district of the candidate;

(9) that the candidate will meet the specific citizenship requirements of the office for which the person is a candidate;

(10) that the candidate is a qualified voter as required by law;

(11) that the candidate will meet the specific age requirements of the office for which the person is a candidate;

(12) that the candidate requests that the candidate's name be placed on the primary election ballot;

(13) that the required fee accompanies the declaration;

(14) that the person is not a candidate for any other office to be voted on at the primary or general election and that the person is not a candidate for this office under any other declaration of candidacy or nominating petition;

(15) the manner in which the candidate wishes the candidate's name to appear on the ballot; and

(16) that the candidate is registered to vote as a member of the political party whose nomination is being sought.

(b) A person filing a declaration of candidacy under this section, other than a person subject to AS 24.60 who is filing a declaration for a state legislative office, shall simultaneously file with the director a statement of income sources and business interests that complies with the requirements of AS 39.50. A person who is subject to AS 24.60 and is filing a declaration of candidacy for state legislative office shall simultaneously file with the director a disclosure statement that complies with the requirements of AS 24.60.200.

(c) An incumbent public official, other than a legislator, who has a current statement of income sources and business interests under AS 39.50 on file with the Alaska

Public Offices Commission, or an incumbent legislator who has a current disclosure statement under AS 24.60.200 on file with the Alaska Public Offices Commission, is not required to file a statement of income sources and business interests or a disclosure statement with the declaration of candidacy under (b) of this section.

AMENDMENT TO THE CONSTITUTION.

ARTICLE I.

Freedom of religion, of speech, and of the press. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

RULES OF THE REPUBLICAN PARTY OF ALASKA

ARTICLE XII – GENERAL POLICIES

Section 14. Severability

The various rules of the Republican Party, including those relating to the primary elections, are severable. Any invalidity or unenforceability of any rule or part thereof, shall not affect the remainder of the rule or rules in any way.

ARTICLE XIV PRIMARY ELECTIONS

Section 1. Eligible Voters

Only registered Republicans, registered independents, and those who state no preference of party affiliation shall be allowed to vote in the Republican primary election for Governor, Lieutenant Governor, U.S. Senator, U.S. Representative, and members of the State Legislature.

Section 2. Republican Designation

No person may use the word Republican on any ballot or in any campaign as part of a description of himself as a candidate unless that person is a candidate of the RPA, selected according to the Rules of the RPA.

Section 3. Maximize Voter Participation in Primary Elections

(a) Any voter qualified to vote in the Republican Party primary may vote in that election, regardless of

whether or not that voter has voted in the primary election of any other party.

(b) The fact that a voter has voted in the Republican Party primary election shall not disqualify that voter from voting in the primary election of any other political party or parties, where that voter's participation in the primary election of other parties is authorized or permitted by the rules of the other party or parties, or the statutes of the United States or the State of Alaska.

Section 4. Implementation of Primary Election

The SCC, or the EC in the event that there is insufficient time to convene the SCC, may adopt any and all additional rules, regulations, interpretations, clarifications, and the like, which are necessary or desirable to implement the Republican primary election in accord with other rules adopted at this Special Convention (held March 2, 1991), and pursuant to Article XIV of the Rules of the RPA. Any action taken by the Central or Executive Committee under the provisions of this rule shall have the same force and effect as if adopted by this Convention.

Section 5. Prior Registration Requirement

In order to be a candidate in any Republican Party primary election, a person must have been a registered voter of the Republican Party of Alaska for a continuous period of six (6) months immediately prior to the filing deadline for the primary election. The SCC for statewide candidates and the DC for district candidates may by two-thirds (2/3) vote of each organized committee involved,

waive this rule for specific candidates when they determine such action to be in the best interests of the Republican Party.
